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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Isidro Pacheco,

10 Petitioner,

11 v.

12 Charles L Ryan, et al.,

13 Respondents.
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No. CV-15-02264-PHX-DGC

ORDER

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16 On June 21, 2018 Petitioner Isidrio Pacheco filed a motion for issuance of writ due
17 to non-compliance with this Court's December 22, 2016 order conditionally granting
18 Petitioner's writ of habeas corpus. Doc. 32. The state has filed a response, asserting full
19 compliance with the Court's order. Doc. 33. Petitioner has filed a reply. Doc. 34. For
20 the reasons set forth below, the Court will deny Petitioner's motion.

21 **I. Background.**

22 In 2013, Petitioner was charged with child molestation and sexual conduct with a
23 minor. Doc. 19 at 2. He accepted a plea deal and the superior court sentenced him to 17
24 years. *Id.* at 3. Because Petitioner entered a plea, he had no right to file a direct appeal
25 under Arizona law. *Id.* at 4 (citing A.R.S. § 13-4033(B); Ariz. R. Crim. P. 17.1(e)).

26 Petitioner filed a timely notice of post-conviction relief pursuant to Rule 32 of the
27 Arizona Rules of Criminal Procedure. Doc. 12-1 at 57; *see also* Ariz. R. Crim. P.
28 32.4(a)(1). Petitioner's appointed counsel filed a notice of no colorable claim, stating

1 that she found no meritorious issue for review. Doc. 12-1 at 61. The only request in the
2 notice was that Petitioner be allowed to file a *pro se* petition for post-conviction relief.
3 *Id.* Petitioner filed his *pro per* petition, asserting ineffective assistance of counsel and
4 sentencing error. *Id.*

5 The trial court summarily denied the petition. Petitioner sought review before the
6 Arizona Court of Appeals, contending that the trial court erred in issuing a “format letter”
7 finding that he had failed to assert colorable claims. Petitioner also argued that his post-
8 conviction relief (“PCR”) proceeding was the equivalent of a direct appeal and that the
9 trial court erred by failing to review the record for “fundamental error” as required by
10 *Anders v. California*, 386 U.S. 738 (1967). *Id.* at 4-5. The Court of Appeals granted
11 review but denied relief, rejecting all of Petitioner’s arguments. *Id.* at 5.

12 **B. The First Petition for Habeas.**

13 Petitioner filed a petition for writ of habeas corpus with this Court in November,
14 2015. He asserted four grounds. The first three, which the Court denied, alleged
15 ineffective assistance of counsel. Doc. 19 at 6. The fourth ground alleged that Petitioner
16 was entitled under *Anders* to a review of the record for “fundamental error” by the trial
17 court because his PCR proceeding was the equivalent of a direct appeal. Doc. 19 at 6.
18 The magistrate judge found “Petitioner’s rights under *Anders* were violated. *Id.* at 66.

19 On December 22, 2016, this Court denied the state’s objections and issued a
20 conditional grant of a writ of habeas. Doc. 26. The order required that Petitioner be
21 permitted to file a new of-right Rule 32 PCR proceeding, “including the filing of a brief
22 by counsel and an independent review of the record by the trial court consistent with
23 *Anders*[.]” Doc. 26.

24 **C. Second PCR**

25 On January 3, 2017, Petitioner filed his second notice of post-conviction relief in
26 the superior court and was appointed counsel. Doc. 32 at 7. Counsel filed a new of-right
27 Rule 32 petition for post-conviction relief on January 29, 2018. *Id.* The petition alleged a
28 significant change of law because Arizona’s child molestation statute was found

1 unconstitutional in *May v. Ryan*, 245 F. Supp. 3d 1145, 1158 (D. Ariz. 2017). *Id.* The
2 petition also alleged ineffective assistance of counsel because Petitioner's original trial
3 counsel should have interviewed Petitioner's alibi witness, moved to suppress his
4 confession, and presented mitigation evidence. *Id.* at 8-12. Further, the petition alleged
5 that the trial court failed to inform Petitioner of the sentence enhancement under
6 Arizona's Dangerous Crimes Against Children Act ("DCACA"), rendering his plea
7 agreement invalid. Doc. 32 at 12-6. Finally, the petition alleged that the DCACA
8 sentencing scheme is unconstitutional because it enhances a sentence based on facts
9 found by a judge instead of facts found by a jury beyond a reasonable doubt. Doc. 32
10 at 16.

11 On June 11, 2018, the superior court denied the Rule 32 petition, finding that "all
12 matters contained in the Petition for Post-Conviction Relief are precluded as having been
13 previously ruled upon or untimely filed[,] or the Petition lacks sufficient basis in law and
14 fact to warrant further proceedings herein and no useful purpose would be served by
15 further proceedings." Doc. 32 at 50. Petitioner then filed the motion for issuance of the
16 writ in this Court, arguing that the superior court's decision did not satisfy the Court's
17 order for a new of-right PCR. Doc. 32. Petitioner argued that the superior court did not
18 afford him a new Rule 32 proceeding because it found the issues raised to be precluded or
19 untimely which meant that it "treated the appeal as a successive action limiting the scope
20 of [appealable] issues." Doc. 32 at 2.

21 The state filed a request for clarification in the superior court (see Doc. 34 at 5-6),
22 and that court issued supplemental findings of fact and conclusions of law on July 12,
23 2018. *See* Doc. 33-1 at 2. The order supplemented the court's June 11, 2018 order "after
24 fully considering [Petitioner's petition] on its merits." Doc. 34 at 18. The court found
25 that *May v. Ryan* did not constitute a significant change in the law because a district court
26 decision is not the controlling authority for Arizona state courts. Doc. 33-1 at 4. The
27 superior court noted that it was bound by Arizona Supreme Court precedent, which has
28 found Arizona's child molestation laws to be consistent with due process and therefore

1 constitutional. *Id.* (citing *State v. Holle*, 379 P.3d 197 (Ariz. 2016)). The court found
2 that Petitioner's counsel was not ineffective, finding Petitioner waived claims unrelated
3 to the validity of his plea agreement, and that Petitioner failed to present evidence that
4 proved counsel's failure would have affected his plea agreement.¹ *See* Doc. 33-1 at 6-7.

5 The court also found that Petitioner was not entitled to a jury trial for the
6 sentencing enhancement because the right to a jury under *Apprendi v. New Jersey*, 530
7 U.S. 490 (2000), applies only if the penalty is increased beyond the prescribed statutory
8 maximum. *See* Doc. 33-1 at 7. Further, the court found that Petitioner knew of the
9 sentencing enhancement because he knew throughout the process that the state charged
10 him with a dangerous crime against children. Doc. 33-1 at 8. The court determined that
11 the sentencing under DCACA is not discretionary but mandatory based on the crimes
12 charged, and disagreed that DCACA allows the judge to find a fact to increase the
13 penalty. *Id.* at 7-8. The judge is not required to make a finding of fact as to a victim's
14 age for DCACA because the victim's age is an element of the crime the state must prove.
15 *Id.* Moreover, the judge is not required to make a finding of the perpetrator's intent to
16 exploit a child as an element of a crime prosecuted under DCACA. *Id.*

17 After this clarification, Petitioner filed a reply in support of his motion in this
18 Court. His reply argued that the superior court's supplemental order does not comply
19 with the Court's conditional grant of habeas relief because it essentially copied verbatim
20 the state's response to the PCR court. Doc. 34 at 2.

21 **II. Legal Standard.**

22 Once a federal district court issues an order granting conditional habeas relief, the
23 court retains authority to review compliance with that order. *Leonardo v. Crawford*, 646
24 F.3d 1157, 1161 (9th Cir. 2011). Failure to comply requires a petitioner's release.
25 *Harvest v. Castro*, 531 F.3d 737, 750 (9th Cir. 2008). When a petitioner alleges

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27 ¹ The court also addressed whether Petitioner demonstrated his claim that the
28 victim was biased, but Petitioner did not assert a claim for victim bias. Doc. 33-1 at 5.

1 noncompliance with a conditional writ, “the district court must make a finding
2 concerning the sufficiency of the action that the state took pursuant to its mandate.”
3 *Phifer v. Warden, U.S. Penitentiary, Terre Haute, Ind.* 53 F.3d 859, 865 (7th Cir. 1995).
4 In making this determination, the district court may consider whether the state’s actions
5 ran afoul of the “letter or spirit” of the conditional writ. *Patterson v. Haskins*, 470 F.3d
6 645, 668 (6th Cir. 2006).

7 **III. Analysis.**

8 The Court’s conditional grant of habeas relief required (1) a new of-right Rule 32
9 proceeding, (2) with briefing, and (3) a review of the record consistent with *Anders*.
10 Doc. 26 at 18. The superior court clearly satisfied the first two requirements: Petitioner
11 was permitted to file a new Rule 32 proceeding and to submit briefing. The question,
12 then, is whether the superior court conducted a review of the record “consistent with
13 *Anders*.: *Id.* If *Anders* did not require a review of the record, then the superior court
14 satisfied this requirement as well.

15 A reviewing court must conduct an *Anders* review when an assigned attorney
16 determines that there are no colorable claims to appeal. *Smith v. Robbins*, 528 U.S. 259,
17 264 (2000). Before an attorney may withdraw, he or she must submit a brief “referring to
18 anything in the record that might arguably support the appeal.” *McCoy v. Court of*
19 *Appeals of Wisconsin, Dist. 1*, 486 U.S. 429, 430 (1988). The reviewing court must then
20 conduct a full examination of all the proceedings to decide whether any claims are solely
21 frivolous. *Penson v. Ohio*, 488 U.S. 75, 80 (1988). If the appellate court finds an
22 arguable issue, it will order appointed counsel to file a brief on the issue. *State v. Clark*,
23 2 P.3d 89, 96 (Ariz. Ct. App. 1999); *McCoy*, 486 U.S. at 431; *Anders*, 386 U.S. at 744;
24 *State v. Thompson*, 270 P.3d 870, 873 (Ariz. Ct. App. 2012). The primary purpose of
25 *Anders* review is to protect the underlying right to counsel. *Penson*, 488 U.S. 80.

26 A merits briefs filed by a petitioner’s counsel serves different purposes than an
27 *Anders* briefs. *McCoy*, 486 U.S. at 444. A merits brief raises issues presented in the
28 record and urges the court to grant relief, while an *Anders* brief assures the court that the

1 attorney has fulfilled his or her duty. *Id.*; *Anders*, 386 U.S. at 742; *State v. Scott*, 930
2 P.2d 551, 555 (Ariz. Ct. App. 1996) (“In an *Anders* appeal, the role of the court is not to
3 decide the merits of any issues presented, but to ensure that the defendant has received
4 constitutionally adequate representation on appeal.”); *see also Smith*, 528 U.S. at 268
5 (*Anders* sets forth the exclusive procedure in which an “appointed counsel’s performance
6 can pass constitutional muster.”). Thus, when counsel files a brief on the merits, the
7 appellate court no longer has a duty to search the record for appealable issues. *Anders*
8 review is not required. *State v. Scott*, 930 P.2d at 555; *see also Clark*, 2 P.3d at 95 n.5.

9 Here, Petitioner’s newly-appointed counsel filed a merits brief on the PCR
10 petition, raising three specific grounds for review. *See* Doc. 32. The attorney did not
11 seek to withdraw because there were no reviewable issues, but instead studied the record,
12 identified issues for review, and sought to persuade the court that relief was warranted.
13 This was not an *Anders* brief. As a result, Petitioner was not entitled to *Anders* review
14 and the superior court did not err by failing to conduct such a review. Nor did the
15 superior court violate this Court’s order which required only that it “review the record
16 consistent with *Anders*.” Doc. 26 at 18.

17 Petitioner argues that the superior court did not properly afford him a new of-right
18 proceeding because its June 11, 2018 order summarily dismissed his issues by finding
19 them “precluded as having been previously ruled upon or untimely filed.” Doc. 32
20 at 2, 50. But the superior court issued a supplemental order in support of its ruling, and
21 “the federal court should review ‘the last reasoned decision’ by a state court.” *Robinson*
22 *v. Ignacio*, 360 F.3d 1044, 1055 (9th Cir. 2004). The supplemental order addressed each
23 of Petitioner’s arguments on the merits and affirmed the denial of post-conviction relief.

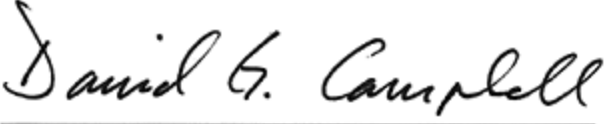
24 In his reply, Petitioner complains that the superior court issued its supplemental
25 findings only at the request of the Pinal County Attorneys’ Office and that the
26 supplemental order “appears to be a plagiarized copy of the State’s response to
27 [Petitioner’s] petition.” Doc. 34 at 2. Petitioner cites no authority explaining why these
28 characteristics make the superior court’s order noncompliant with the Court’s conditional

1 grant. If the superior court did adopt the arguments of the state, the “practice is generally
2 disproved of,” but a verbatim adoption of a party’s proposed findings of fact and
3 conclusions of law is not automatically objectionable if the findings are supported by the
4 record. *See FTC v. Enforma Nat. Prods., Inc.*, 362 F.3d 1204, 1215 (9th Cir. 2004). A
5 reviewing court must decide if the adopted conclusions are correct and fully supported by
6 the evidence. *See United States v. El Paso Nat. Gas Co.*, 376 U.S. 651, 656 (1964)
7 (holding that, where a district judge adopted verbatim proposed findings of fact and
8 conclusions of law submitted by prevailing party after trial, such findings should “not
9 [be] rejected out-of-hand, and [should] stand if supported by [the] evidence”); *In re Dixie*
10 *Broadcasting, Inc.*, 871 F.2d 1023, 1030 (11th Cir. 1989) (holding that the practice of
11 ghostwriting judicial opinions by a litigant is not per se invalid, and the resulting order
12 will be vacated if the party can demonstrate fundamental unfairness); *State of Florida*
13 *Board of Trustees of Internal Improvement Trust Fund v. Charley Toppino & Sons, Inc.*,
14 514 F.2d 700, 703 (5th Cir. 1975) (practice of adopting party’s proposed findings of fact
15 and conclusions of law is subject to “clearly erroneous” standard of review).

16 The Court will not address the substantive accuracy of the supplemental order
17 until Petitioner has exhausted state remedies. 28 U.S.C. § 2254(b)(1). To properly
18 exhaust state remedies, Petitioner’s claims must be fairly presented to the highest state
19 court to provide that court with an opportunity to rule on the merits of Petitioner’s claims.
20 *Middelton v. Cupp*, 768 F.2d 1083, 1086 (9th Cir. 1985). Petitioner has not yet sought
21 review of the superior court’s PCR decision in the Arizona Court of Appeals or the
22 Arizona Supreme Court. Ariz. R. Crim. P. 32.9(a)-(g) (parties may move for
23 reconsideration or review by an appellate court, and rules governing criminal appeals also
24 govern appellate review). Only after the state courts have had an opportunity to rule on
25 any fairly presented constitutional issues will federal courts consider them in habeas
26 proceedings. *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (petitioner must invoke
27 one complete round of the state’s established appellate review process).

1 **IT IS ORDERED** that Petitioner's Motion for Issuance of Writ Due to Non-
2 Compliance of this Court's Order (Doc. 32) is **denied**.

3 Dated this 9th day of October, 2018.

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8 David G. Campbell
9 Senior United States District Judge
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